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## The Resilience of EU Market Citizenship

Niamh Nic Shuibhne\*

### I. Introduction

The idea of market citizenship is often invoked in discourse on EU citizenship, but usually in order to suggest that EU citizenship should not be conceptualised in this way. The dominant argument sees market citizenship as a vestige of history, and contends that EU citizenship has now evolved beyond its primitive roots into a more substantial (typically, more state-like) bond.<sup>1</sup> The transmutation is sometimes evidenced by the reduction in meaningfulness of economic self-sufficiency as a precondition for EU legal protection of those who move to (or between) and/or reside in Member States other than the State of their nationality.<sup>2</sup> The complexities of transnational citizenship have also generated thoughtful and original ways of characterising its development over time.<sup>3</sup>

Others argue that even this evolved ‘something’ is less than what citizenship (in normative terms) requires, needs, or deserves; that the EU generates a version of pseudo-citizenship at best, draping a thin veil of self-serving rhetoric over its formative and enduring economic ancestry. In other words, even if EU citizenship does now mean ‘more’, something achieved mainly through a process of legal substantiation, that does not necessarily imply that it yet means ‘enough’. Staying with the example of self-sufficiency, the supporting claim here would question the retention of any economic preconditions at all and argue for stronger

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<sup>1</sup> E.g. D Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 *MLR* 233 at 233-234.

<sup>2</sup> E.g. para. 54 of AG Mazák’s Opinion in Case C-158/07 *Förster v IB-Groep* [2008] ECR I-8507: ‘It is thus fair to say that the concept of Union citizenship, as developed by the case-law of the Court, marks a process of emancipation of Community rights from their economic paradigm ... Community law rights – in particular the right not to be subjected to unjustified discrimination – are no longer bestowed upon citizens solely when they make use of the economic freedoms and assume a corresponding status (worker, provider of services etc.), but directly by virtue of their status as a citizen of the Union.’ The financial resources and medical insurance conditions that curb movement and residence rights are set out mainly in Articles 7 and 24(2) of Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 OJ L158/7.

<sup>3</sup> E.g. T Faist, ‘Social citizenship in the European Union: Nested membership’ (2001) 39 *JCMS* 37; K Nicolaïdis, ‘The new constitution as European “demoi-cracy”?’ (2004) 7 *Critical Review of International Social and Political Philosophy* 76; D Kostakopoulou, ‘European Union citizenship: Writing the future’ (2007) 13 *ELJ* 623; A Somek, *Individualism: An Essay on the Authority of the European Union*, (OUP, 2008).

host State obligations to grant social assistance to migrant EU nationals. Underlying some of these arguments, there is perhaps also a suspicion that, even with the best of intentions, the EU as a polity is intrinsically debarred from generating *real* citizenship, because that relationship is more properly or even uniquely the preserve of states. This is not just a critique of the EU as citizenship-*worthy*, but a questioning of whether it is even citizenship-*capable*.

The argument developed in this article falls somewhere in between the two positions. It seeks to unpick the normative and legal qualities of EU citizenship on an empirical basis, and argues that it has not (yet) evolved beyond a market citizenship construction. EU citizenship is a deeply contested concept and the danger with developing any arguments grounded in market citizenship is that the very connotation sparks reflexive rejection. We want to move away from market associations; we strive to show that we have done so. As the EU matures in polity-terms, scholarship seeking to articulate its citizenship has flourished; but then, approaches inevitably diverge.

Michelle Everson's benchmark exploration of EU market citizenship remains one of the few studies framed expressly around these questions. Distinguishing the 'market citizen' and the 'Union citizen', she outlined the 'intended contrast' between these two archetypes notwithstanding the 'core of the new concept [being the] same right of mobility'.<sup>4</sup> Adopting a clear chronological split between the eras of market and Union citizenship,<sup>5</sup> she argued that market citizenship in general is *inherently* limited. Critically, however, she did this by tracing the market citizen's profile 'in the *national* setting [as] a subsidiary role which citizens proper were expected to play'.<sup>6</sup>

This article is not suggesting that EU citizenship is 'destined', to paraphrase the Court, only and ever to remain a form of market citizenship. But drawing from both the nature of the EU as a polity and the substance of EU citizenship as it has actually developed within the paradigm of EU law, it argues that both the reality – and scope – of *transnational* market citizenship may offer more than we tend to presume. It is at least one valid and credible way of capturing how EU citizenship has developed in reality and of accommodating at least some aspects of its continued deepening. Normative understandings

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<sup>4</sup> M Everson, 'The legacy of the market citizen', in J Shaw and G More (eds.) *New Legal Dynamics of European Union*, (Clarendon Press, 1995) 73 at 73.

<sup>5</sup> E.g. '[t]he central issue [of the chapter will be] whether the concept of the market citizen has created any particular problems which require urgent attention (or correction) via the medium of the institution of the Union citizen' (*ibid.*, 74).

<sup>6</sup> *Ibid.*, 87 (emphasis added). For discussion of literature criticising the status of the state-market citizen, see esp. 84-85.

and expectations of EU citizenship have clearly progressed beyond state-rooted ideas of market citizenship. But has the substance of EU citizenship actually exceeded the frame of a complex transnational market? The article also argues that political thickening of EU citizenship has not, to date, undermined the market citizenship assertion. The Treaties and innumerable institutional statements can repeatedly tell us that the citizen is at the heart of the European project; but that is not enough to make it so.

After a brief discussion on the nature of the EU as a polity, the qualities of the transnational market sited within that polity will be outlined. The possibilities afforded by market citizenship are thus strongly contextualised within the particularities of the EU and, especially, its constitutionally enriched legal order. This leads to the claim that market citizenship, understood from this specific perspective, might *still* be an appropriate and legitimate descriptor of EU citizenship. The continuing significance of free movement rights is another critical factor in this characterisation. The growing impact of developments beyond free movement law is recognised to a certain extent, but the argument stops short of construing this as an equally-paced alchemic reaction in social and political terms.

The article thus advances a more ambitious profile for market citizenship but a more modest view of EU citizenship – for now, at least – than is usually presented. It will be acknowledged that we may be standing at the threshold of fundamental change just now, facing the prospect of a genuinely transformative phase in the evolution of EU citizenship. Thus, whether EU market citizenship does turn out to be a transitional formation, albeit of longer duration than is normally accepted, remains to be seen.

## **II. EU Citizenship and the Polity Impact**

Analyses of EU citizenship often address what citizenship either brings to or says about the nature of the EU as a polity. The starting point here raises the inverse question instead: how does the nature of the EU as a polity inherently condition 'its' citizenship?

The language of citizenship is essentially one of membership (and, conversely, of non-membership or exclusion). It draws from discourse on democracy, participation and contribution; politics and constitutionalism; rights or entitlements; and reciprocal obligations or duties. There is an unsettled question about whether or not it also has an emotional dimension, moving the language of citizenship into (self-)perception, loyalty, and belonging

(not far removed from the concept of nationality).<sup>7</sup> Reflections on citizenship are also powerfully shaped by ideological and philosophical influences. For example, commentators engage communitarian or liberal or republican values when prescribing or assessing the relationship between a polity and its citizens.<sup>8</sup> The relationship between and proportional importance attached to these elements is typically contested, however; there is no universal definition and citizenship is inevitably contextualised – in other words, there can be *versions* of citizenship, within which different elements are highlighted, configured or emphasised in different ways, to explain different social and historical contexts, or to fit different ideological or philosophical perspectives. Through this manoeuvring, the concept of citizenship acquires not just contexts, but also a series of framing adjectives – market citizenship, political citizenship, cultural citizenship, social citizenship, and so on.<sup>9</sup> The selection and attachment of adjectives can be loaded with meaning, preference and expectation – and can also bring about negative associations.

Our experience and expectations of contemporary citizenship have emerged mainly through centuries of citizenship practice within the paradigm of states. But that polity connection is circumstantial. It has been essential, of course; but it is neither necessarily nor irrevocably written into citizenship's genetic code. Whether it was an attempt to capture or manufacture a relationship between the EU and Member State nationals, the choice of 'citizenship' at Maastricht as the centre of gravity for Articles 20-25 TFEU brought with it state-citizenship's primeval narrative of meaning, ideology, and expectation – though, again, it would be more accurate to say meanings, ideologies and expectations. A perennial question in the EU context is whether a legitimate or accepted form of citizenship can be re-imagined in the context of a non-state polity. This is not the same thing as trying to avoid state-based comparisons just because they throw up difficult or uncomfortable conceptual obstacles. The rejection of EU citizenship as a form of market citizenship on the grounds of the latter's diminution as a sufficient or valuable status within states is, rather, incomplete.

In one of the earliest extensive studies on EU citizenship from a legal perspective, O'Leary developed a working definition that enables us to reflect on both the relative elemental looseness of citizenship and its having a fundamental essence. She considered citizenship to be 'a juridical condition which describes membership of and participation in a

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<sup>7</sup> See S O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, (Kluwer Law International, 1996) 4-13.

<sup>8</sup> See 'Introduction: From national to transnational citizenship' to R. Bellamy, D Castiglione and J. Shaw (eds.), *Making European Citizens* (Palgrave, 2006) 1-28.

<sup>9</sup> Much of this is built on the foundational work of T.H. Marshall, *Citizenship and Social Class*, (CUP, 1950).

defined community or state [carrying] with it a number of rights and duties which are, in themselves, an expression of the political and legal link between the state and the individual.’<sup>10</sup> Using this definition, it is similarly accepted here that the EU is citizenship-capable. In the next two sections, this general understanding of citizenship is developed in the particular context of the EU polity.

*A. The EU polity: constitutionally strong, politically challenged*

The EU is a necessary and effective expert in middle management, sitting between the transnational interests of its Member States and the external global concerns that it increasingly navigates on their behalf. When we think about entities positioned, in broad terms, alongside the EU (e.g. the European Economic Area or the World Trade Organisation), we know instinctively that the idea of EEA or WTO citizens is absurd. What is it about the EU that begets the credible possibility of EU citizens? The answer to this seems rooted in the comparatively complex machinery wrapped around the EU, in those particular features that make it a *polity*, distinguishing it from these other ‘organisations’.

A polity is defined here as a formalised and recognised unit having political, constitutional and economic elements.<sup>11</sup> The EU exhibits all of these characteristics. But, like the versions of citizenship suggested above, it does not exhibit them in an equally weighted sense. Moreover, the EU does not have to exhibit them in the same way as a state does. It may be more accurate to describe the EU as having economic, constitutional and political depth in that (reverse) order. This then maps onto the consequential polity conditioning of EU citizenship, which in turn strongly suggests a market character.

The EU is clearly a *dynamic polity*, in that it is a project under continuous construction. Significant changes in its make-up and functions over time have not been linear. They have occurred partly through deliberate choices of the Member States; but also partly organically, and often through creative interpretation of the boundaries of the Treaties by the Court of Justice. Even here, though, the acquiescence of the States plays a critical legitimating part. This introduces, second, the EU as a *symbiotic polity*. While it resembles a federal state in many

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<sup>10</sup> O’ Leary, n7 above, 13.

<sup>11</sup> The idea of a polity is used here in terms of denoting an existential depth rather than the Aristotelian exposition, which related to the status and authority structures of the Greek city and was woven around more specific community-oriented features or requirements. A helpful symmetry between the EU as a polity in contemporary terms and the city as a polity in historical terms, however, is that having the characteristics of a polity is a necessary precondition for the generation of a legitimate citizenship relationship. In other words, organisations cannot have citizens; but polities – and not, therefore, *only* states – *can*. I am grateful to Claudio Michelon for discussion on this point.

ways, it is not one.<sup>12</sup> It remains dependent on the Member States for its outline shape; for the attribution of its competences and the design of its institutions; and, ultimately, for its continued existence. Significantly, this is expressly reflected in the complementarity of its transnational citizenship – rephrased as additional-ity in Article 20(1) TFEU.<sup>13</sup> Third, the EU is very obviously a *transnational polity*.

Before addressing the economic dimension separately in section B below, it was noted above that constitutional and political elements also contribute to the formation of legitimate polities. Drawing from a commonly applied distinction, ‘constitutional’ is used here to mean the law-*framing* structure of a polity and ‘political’ refers to its law-*making* processes. In the context of a state, these elements are very obviously linked i.e. there are evident constitutional and political dimensions to both law-framing and law-making debates. There is a widely perceived separateness and indeed unevenness of the two in the EU, however – in other words, the EU as a polity is typically considered to be constitutionally advanced but, thinking especially of critiques on democracy deficits and legitimacy gaps, it is much more exposed in political terms.<sup>14</sup>

The classic standoff about whether the primacy of EU law takes effect because the Court of Justice says so or because of the tolerance of national courts and parliaments is a classic example of the first-principles uncertainty that still characterises EU constitutional questions.<sup>15</sup> But it is accepted nonetheless that the EU *is* a constitutional polity – or, at least, a polity to which constitutional principles quickly became attached.<sup>16</sup> That debate sub-divides into ‘big C/small c’ constitutionalism,<sup>17</sup> reflecting the distinction between self-conscious, Treaty-destined constitutional ambition and the more amorphous evolution of extra-Treaty

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<sup>12</sup> For a recent thesis on the EU as a ‘federation of states’, see R Schütze, ‘On “federal” ground: The European Union as an (inter)national phenomenon’ (2009) 46 *CMLRev* 1069.

<sup>13</sup> The conceptual value of complementary citizenship (especially against the thinness of transnational welfare solidarity to date) is discussed in R Bellamy, ‘The liberty of the post-moderns? Market and civic freedom within the EU’, LEQS paper No. 01/2009, at <http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPapers.aspx>

<sup>14</sup> See, for example, Y Meny, ‘*De la démocratie en Europe*: Old concepts and new challenges’ (2003) 41 *JCMS* 1; A Føllesdal and S Hix, ‘Why there is a democratic deficit in the EU: A response to Majone and Moravcsik’ (2006) 44 *JCMS* 533.

<sup>15</sup> The debate on EU constitutional pluralism is a burgeoning limb of this question: See N MacCormick, ‘Beyond the Sovereign State’ (1993) 56 *MLR* 1; N Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *MLR* 317; M Poaires Maduro, ‘Europe and the Constitution: What if this is as good as it gets?’, in JHH Weiler and M Wind (eds.), *Constitutionalism Beyond the State*, (CUP, 2003) 74; J Baquero Cruz, ‘The Legacy of the Maastrich-Urteil and the Pluralist Movement’ (2008) 14 *ELJ* 389; and G Davies, ‘Constitutional disagreement in Europe and the search for pluralism’, Eric Stein Working Paper No. 1/2010, available at <http://www.ericsteinpapers.eu/papers/2010/1.html>.

<sup>16</sup> See J Hunt and J Shaw, ‘Fairy Tale of Luxembourg? Reflection on Law and Legal Scholarship in European Integration’ in D. Phinnemore and A. Warleigh (eds) *Reflections on European Integration: 50 Years of the Treaty of Rome* (Palgrave, 2009), 93.

<sup>17</sup> N Walker, ‘Big “C” or small “c”?’ (2006) 12 *ELJ* 12.

constitutional'ism' through case law.<sup>18</sup> In national settings, constitutions emerge from political processes – usually, political storms. In the EU context, constitutionalism emerged by stealth –by law, with the Court of Justice as the chief hero-villain.<sup>19</sup> The legitimating quality of law itself offers some degree of authority here.<sup>20</sup> But it is not enough properly to explain the profundity of the original leap to constitutionalism or its amplification since then. If any suspension of disbelief is called for, it is not because of the substance of landmark constitutional judgments.<sup>21</sup> It is more that they were allowed to take root and then to inform subsequent decisions in both EU and national courts; that crisis talks were not rashly convened after *van Gend en Loos* to collapse this auto-referential 'new' legal order.

So the States may not have started the process of EU constitutionalism through political routes, but they allowed it to happen – and to continue. Partly, the 'mythical neutrality and religious-like authority with which we invest our supreme courts'<sup>22</sup> saved EU constitutional discourse; and partly, because deconstruction of the EEC would have been not only politically messy<sup>23</sup> but also politically traumatic, given post-War determination to progress the idea and potential of the new Communities.

It has also been significant that conversations about constitutionalism/law-framing and politics/law-making have tended to be parallel rather than appropriately overlapping or joined-up, often because of disciplinary boundaries within EU scholarship. The law-making institutional structure of the EU is perceived, furthermore, to emancipate national (and supranational) politicians from familiar State-like checks and balances, accentuating

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<sup>18</sup> For recent, Lisbon-inclusive discussion of both narratives, see J Shaw, 'Citizenship: Contrasting dynamics at the interface of integration and constitutionalism' in P Craig and G de Búrca (eds.) *The Evolution of EU Law*, 2nd ed. (OUP, 2010, forthcoming).

<sup>19</sup> The foundational decisions on direct effect, primacy and a system of State liability for breaches of Community law include Case 26/62 *Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585; Joined Cases C-46 and 48/93 *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport, ex parte Factorame* [1996] ECR I-1029. Another important example is the jurisprudence on EU recognition and protection of fundamental rights, stemming initially from one terse statement in Case 29/69 *Stauder v City of Ulm* [1969] ECR 419 and triggering ultimately the political development of the EU Charter of Fundamental Rights.

<sup>20</sup> See Hunt and Shaw, n16 above, for critique of key scholarship on this point.

<sup>21</sup> On the 'undeniable coherence' of this constitutional progression, see JHH. Weiler, 'The transformation of Europe' (1990-1991) 100 *Yale Law Journal* 2403 at 2524-5.

<sup>22</sup> Weiler, *ibid.*, 2428; for others, however, the 'spectre of judicial supremacy' might be a more appropriate characterisation (see O. Gerstenberg, 'Expanding the constitution beyond the Court: The case of Euro-constitutionalism' (2002) 8 *ELJ* 175 at 177).

<sup>23</sup> See M Shapiro, 'The European Court of Justice', in P Craig and G de Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) 321 at 329. For an analysis of Advocate General, Commission and Member State influence on the Court in the period of its formative constitutional case law, see E Stein, 'Lawyers, judges and the making of a transnational constitution' (1981) 75 *American Journal of International Law* 1.



democracy and legitimacy concerns. In seeking to correct the course and content of EU constitutional and political narratives, plotting 'European' democracy and legitimacy along state tracks has also been problematic.<sup>24</sup> This involves an admission that the EU actually *does* break the mould<sup>25</sup> and that '*all* democracies suffer from some kind of deficit'.<sup>26</sup>

It must also be remembered that EU institutional design is uniquely oriented to its *transnational* make-up and functions; and that genuine institutional reform (especially of the European Parliament) has been vigorously *dynamic* through each phase of Treaty revision.<sup>27</sup> The *sympiotic* nature of the polity also has a particular contribution to make here. Political legitimacy and democratic credentials are vital questions for the EU, and so they should be. But the elements of its dependency on the States that still exist can, do, and perhaps could more consciously be recognised to draw from *their* political legitimacy and democratic credentials too.<sup>28</sup> Now, Article 10 TEU emphasises precisely these mixed ways in which citizens are politically represented, both directly and indirectly, in the processes of EU decision-making.

The jurisprudence of the European Court of Human Rights provides an interesting way for us to think about this, drawing from its decisions on how EU Member States must observe their ECHR responsibilities in the construction and supervision of the EU, centred in particular on their unique capacity to exercise Treaty-making competence.<sup>29</sup> The Member States may transfer authority for the delivery of certain outputs to the EU, but they still 'own' those competences and they infuse (and should be *recognised* as infusing) that transfer with their own political credibility. Not all of the political shortcomings faced by the EU can be

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<sup>24</sup> Meny characterises the harshness of the democratic deficit debate as 'a kind of mystery...given that, after all, the democratic credentials of Europe do not appear so distant, *in practice*, from those of democracies at the national level' (n14 above, 8; emphasis added). This remark has added resonance in the current era of executive primacy, irrespective of what kind of polity is being discussed.

<sup>25</sup> Conjuring the *sui generis* idea; see, for example, Della Scala and A Wiener, 'Constitution making and citizenship practice: Bridging the democracy gap in the EU?', Sussex European Institute (SEI) Working Paper No. 18, 9-11; C Joerges, 'The law in the process of constitutionalizing Europe', EUI Working Paper, Law, No. 2002/4, <http://cadmus.eui.eu/dspace/handle/1814/182>, 6-9; N Walker, 'Constitutionalism and Pluralism in Global Context', in M Avbelj and J Komarek (eds.) *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2010, forthcoming).

<sup>26</sup> Meny, n14 above, 9.

<sup>27</sup> The potential offered by the new citizens' initiative is discussed further below; see Articles 11(4) TEU and 24 TFEU.

<sup>28</sup> See A Menon and S Weatherill, 'Transnational legitimacy in a globalising world: How the European Union rescues its States' (2008) 31 *West European Politics* 397. See also, the attempts of the German Federal Constitutional Court to grapple with these questions (albeit from a State-favoured bias) in its *Lisbon Treaty* decision, BVerfG, 2 BvE 2/08, judgment of 30 June 2009; for analysis and critique, see D Doukas, 'The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty, but Don't Do it Again!' (2009) 34 *ELRev* 866.

<sup>29</sup> *Matthews v United Kingdom* (App. 24833/94; (1999) 28 EHRR 361) and *Bosphorus Airways v Ireland* (App. 45036/98; (2006) 42 EHRR 1).

resolved in this way but some of them certainly can. This suggests a more nuanced disjuncture between the complex constitutional scheme of the EU, developed through its relatively autonomous system of legal integration, and its less worked-out, or at least more ambiguous, political scaffold.

Meanwhile, the day-to-day business of the EU carries on,<sup>30</sup> and the *de facto* acceptance of EU constitutionalism enables its persistence. Whether or not this is accepted as legitimate in normative terms, it has proven durably to be *enough* – at least until it no longer is. Joerges incisively captures the ultimate flaw in our illusion: '[t]his tenacity of the European polity is reassuring, but no more than that. It does not, after all, guarantee that the incremental searching and learning process whereby Europe has "constituted" itself can successfully continue.'<sup>31</sup> While the illusion continues and thereby hardens, the 'constitutionally advanced/politically unusual' model conditions the nature of the EU as a polity – delivering and supporting, in turn, a more deeply constitutional than political version of EU citizenship. We turn now to joining this up with the market.

#### *B. EU constitutionalism and the EU market*

No polity, constitutional or otherwise, exists just for the sake of existence. 'What' is grounded in constitutionalism is the substantive point. And what the EU constitutionalises is a framework within which functions, primarily, a market.

Whether in a state or non-state context, the progression from market to (any kind of) polity is by no means inevitable.<sup>32</sup> It happens through deliberate political and legal *as well as* economic choices both at the time of formation, as/if affirmed since then. Article 3(3) TEU reaffirms the significance of the market within the aims and tasks of the Union. This provision also highlights the complexity of the EU internal market, framing it in a range of cultural, economic, environmental, political and social objectives. Article 26 TFEU (ex 14 EC) is a significant provision of untapped potential with its simple yet sweeping and far-reaching

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<sup>30</sup> See similarly, C Joerges, 'The market without the state? The "economic constitution" of the European Community and the rebirth of regulatory politics', *European Integration online Papers (EIoP)*, vol. 1 (1997), no. 19; <http://eiop.or.at/eiop/texte/1997-019a.htm>, 5; and 'What is left of the European Economic Constitution?', *EUI Working Paper, Law*, No. 2004/13, <http://cadmus.eui.eu/dspace/handle/1814/2828>, 35-6.

<sup>31</sup> C. Joerges, n25 above, 34.

<sup>32</sup> As MacCormick observes, '[c]ivil liberty is favourable to markets, and markets are favourable to civil liberty...neither is strictly essential to the other' (N MacCormick, 'Spontaneous order and the rule of law: Some problems' (1989) 2 *Ratio Juris* 41, 45); similarly, A Evans, 'Union citizenship and the constitutionalization of equality in EU law', in M. La Torre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer Law International, 1998) 267 at 272.

definition of the EU internal market as ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured’. Baquero Cruz has observed, outwith the context of the recent Treaty reform process but with strong resonance for it, that the bias in reform debates is ‘focused on formal or institutional changes [but the] debate on other possible direct and desired changes...in the economic orientation of the Community is simply not taking place.’<sup>33</sup> In other words, the direction and significance of the internal market have been detached from the political debate; both its functioning and flaws are largely taken for granted, as if an intra-state market on this scale was the natural way of things. But it is not. Writing for the Commission in 1996, Monti observed that ‘the single market remains politically centre-stage as a key instrument through which the priorities of the Union can be delivered.’<sup>34</sup> This is not expressed so much these days; in fact, we seem to come up with every reason *but* the market to justify the continued existence and development of the EU.<sup>35</sup>

The deeper constitutional force underpinning the market is often touched on in the literature.<sup>36</sup> Three main strands of scholarship explore the implications of that link more comprehensively. First, there is the debate about whether the EU is or is not a state, or how closely it can be said to resemble one.<sup>37</sup> The typical line of inquiry here looks to institutional

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<sup>33</sup> J Baquero Cruz, *Between Competition and Free Movement* (Hart Publishing, 2002) 84.

<sup>34</sup> M. Monti, *The Single Market and Tomorrow's Europe: A Progress Report from the European Commission* (Kogan Page, 1996) 144.

<sup>35</sup> The deceptive neutrality of progressing integration through the market is exemplified by the quiet but profound political and constitutional changes effected by the 1985 White Paper and the SEA (European Commission, ‘Completing the Internal Market’ – COM (85) 310 final; its omni-sedative effects are described by Weiler, n21 above, 2457). There are some signs of revitalised market debate at the time of writing; after its distinctly underwhelming vision of a *Single market for the 21st century* (COM(2007) 724 final), the Commission subsequently invited former Commissioner Monti to prepare a comprehensive report on the single market, the central theme of which consistently emphasises the importance of the market to EU integration more broadly (M Monti, *A New Strategy for the Single Market: At the service of Europe's Economy and Society*, 9 May 2010, available at [http://ec.europa.eu/bepa/pdf/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf)).

<sup>36</sup> For example, Chalmers points to ‘evidence of an express link between the single market and the normative qualities of the Community legal order’ (D Chalmers, ‘The single market: From prima donna to journeyman’, in J Shaw and G More (eds.) *New Legal Dynamics of European Union* (Clarendon Press, 1995) 55, 60); Reich refers to the ‘economic rights [which] were to form and in fact still constitute the central point of [the EC] constitution’ (N Reich, ‘A European constitution for citizens: Reflections on the rethinking of Union and Community law’ (1997) 3 *ELJ* 131, 142); Maduro notes the ‘interplay between the constitutionalisation of Community law and market integration rules’ (M Maduro, *We, The Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998) 8); and Weiler describes the common market as ‘the heart of the material or substantive constitution of the Community’ but, significantly, he continues that this ‘is, too, an important part of overall European constitutionalism’ (JHH Weiler, ‘The constitution of the common market place: Text and context in the evolution of the free movement of goods’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, (OUP, 1999), 349 at 350; see also 363).

<sup>37</sup> See again, Schütze, n12 above, 1105.

structures and related principles, but the fusion of constitution and market does sometimes feature, predominantly in comparative recourse to the development of US constitutionalism and its construction of the ‘earliest common market in existence’.<sup>38</sup> Writing about the nascent American polity, James Bryce’s work on constitution-market linkages is remarkably prescient of the eventual EU experience – especially where he points to the *political* weakness that can slip through a framework which overemphasises constitutional and market strength.<sup>39</sup> A second debate relates to polarised claims about mutual degradation i.e. that the digestion of non-market interests thwarts optimum market liberalisation; or that Union constitutionalism is unduly shaped by market influences.<sup>40</sup> These questions have strong resonance for the view that ‘real’ citizenship should not be similarly tied the market adjective.

Finally, a third debate exploring constitutional-market linkages relates to the influence and/or waning of the theory of the economic constitution. This scholarship looks primarily at the boundaries of institutional regulation along the social fault-lines of the market, drawing heavily from the ‘constitutional messages’ of German ordoliberal scholarship.<sup>41</sup> Despite terminological proximity, the constitutional market iused in this article does not seek to exploit a ‘type’ of constitutionalism as a market tool in the same way. It is more about realising constitutional doctrine around and within the framework and functioning of a market. It is more than ‘economy *as* polity’.<sup>42</sup> As Harden notes, ‘[e]conomic relationships are important, but cannot provide the sole foundation of a constitution.’<sup>43</sup> The mixed intentions that have always fed into the Union ensured that the market was never going to be its *sole* foundation. Both the EU constitution and the EU market have independent

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<sup>38</sup> AJ Mackenzie Stuart, ‘Problems of the European Community: Transatlantic parallels’ (1987) 36 *ICLQ* 183 at 188. More generally, see K Armstrong and S Bulmer, *The Governance of the Single European Market* (Manchester University Press, 1998) 46 *et seq.*

<sup>39</sup> J Bryce, *Studies in History and Jurisprudence*, Vol. I, (OUP, 1901), Essay IV, ‘The action of centripetal and centrifugal forces on political constitutions’, 216, 249. See further, D Edward, ‘Thinking about constitutions’, Federal Trust European Essay No 34, available at [http://www.fedtrust.co.uk/uploads/Essays/Essay\\_34.pdf](http://www.fedtrust.co.uk/uploads/Essays/Essay_34.pdf).

<sup>40</sup> E.g. the extensive commentary reacting to Case C-159/90 *Society for the Protection of the Unborn Child (SPUC) v Grogan* [1991] ECR I-4685; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Eyggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

<sup>41</sup> Joerges, n30 above, 13; see that paper generally for an overview of the origins and development of ordoliberalism. While democratic legitimacy was always centred on private market actors in the original theoretical framework, contemporary debate discusses whether more formalised methods of (less-legal) governance can be accommodated in economic constitutionalism. See also, I Harden, ‘The constitution of the European Union’ (1994) *Public Law* 609 and M Everson, ‘Adjudicating the market’ (2002) 8 *ELJ* 151.

<sup>42</sup> Joerges, n30 above, 30 (emphasis in the original).

<sup>43</sup> Harden, n41 above, 620.

purpose and significance, and independent strength. But in joining them, the Union acquires added force as a citizenship-capable polity.

The assertion that an internal market remains pivotal for the project of European integration should not be taken as a normative claim about the inherent or unique worthiness or otherwise of markets, about their place in contemporary global governance, or about the extent to which they should or should not be regulated. Those debates are real, and pressing, but they are not resolved here. Rather, the claim is more modest: a statement of ‘is’ more than ‘ought’ in casting the internal market as the historical and continuing heartbeat of the EU. The EU exists to encourage, secure, engineer and develop intensive forms of transnational cooperation. The EU also remains a resolute architect of borders; simultaneously dissolving internal borders but hardening external ones. The market is a vitally important means through which those ideas are realised. This does not mean that the EU is not *more than* a market too; but it does suggest that the EU exists *primarily* to deliver a market – albeit a complex transnational market that is trying to find its way among and make a contribution to challenges of global (re)distribution. Its management of trade has evolved over time to site ‘trade’ in changing political and geographical, internal and external contexts.

A *constitutional* market does not presume crude victory for the economic values or vices of the market-place. Rather, constitutionalism *requires* (not just allows) a more nuanced market to take shape. Crucially, this can also be reflected onto a more nuanced construction of market citizenship. It was observed at the outset that market citizenship is almost always used to describe the immature beginnings of EU citizenship, to capture a point in its evolution that is something to be or already left behind – as it was within the paradigm of states. But the personality of *a* market citizen – not a state-based market citizen – is necessarily shaped by the qualities of the market in question and by the demands that the citizen needs to make on that polity (and vice versa). EU citizenship has been principally substantiated, so far, by consolidating and building upon legal rights that relate almost exclusively to transnational movement. Emphasising the polity/citizen link, it follows that more fundamental transfiguration of EU citizenship demands fundamental change of the EU as a polity too. Some examples of transformative events that would profoundly alter both EU citizenship and the EU polity, its relationship to the States and the constitutional rulebooks of all of these polities, will be addressed in part III.

While it seems counter-intuitive, a theory of market citizenship actually takes seriously the call to put the person at the centre of the EU project. In accordance with the express instruction in Article 20 TFEU, it is focused on the added value that transnational

citizenship is asked to deliver and thereby enables EU citizenship to unfold on its own terms. It relies less on synthetic or premature understandings of transnational ‘identity’ or ‘loyalty’ and reflects organic development through the issues and situations that citizens have brought forward for supranational adjudication (though see the discussion in part III on the problematic question of enforcement more generally). The case law also suggests that there are more rights available within a market framework than those that find purely economic expression.<sup>44</sup>

So it is not that market citizenship must inherently fall short but rather, that we tend artificially to constrain the capacity of the market and to overlook the normative as well as economic capacity of a constitutional market. The constitutional frame brings structural advantages too: the primacy of EU law, for example, ensures that when national rules or practices are found to contravene EU citizenship rights, the latter can be forced to prevail. Part III expands on some of these ideas in order to fill out the profile of the EU market citizen more comprehensively and empirically to justify the retention, for now, of the market adjective for EU citizenship.

### III. The Practice and Persistence of EU (Constitutional) Market Citizenship

Long before the formalisation of EU citizenship through the Maastricht Treaty, an implicit stance of a citizenship nature, appreciating the humanity and complexity of free movement rights, was widely traceable in Community legislation<sup>45</sup> and case law,<sup>46</sup> and acknowledged in

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<sup>44</sup> The identity-grounded claims supported in *Garcia Avello* and the way in which their treatment differed from the earlier decision in *Konstantinidis* are illustrative here: cf. Case C-148/02 *Garcia Avello v Belgian State* [2003] ECR I-11613 and Case C-168/91 *Konstantinidis v Stadt Altensteig, Standesamt, & Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191. See also, Case C-353/06 *Grunkin and Paul v Grunkin-Paul and Standesamt Stadt Niebüll* [2008] ECR I-7639. The challenge that these cases pose for the driver of movement raises other questions, returned to in part III.

<sup>45</sup> The extension of Treaty protection to service recipients was a hugely significant step in free movement law, opening the way for claims from cross-border patients to tourists; see Directive 73/148, OJ 1973 L172/14 (now repealed and replaced by Directive 2004/38/EC). Judicial affirmation and development of these principles, and the consequential decoupling of direct connection between the personal and material scope of the Treaty (especially in Case 186/87 *Cowan v Trésor Public* [1989] ECR 195) laid the analytical foundations for later case law on autonomous citizenship rights (notably Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691). The 1990s Residence Directives also shifted emphasis away from occupational activities (Directives 90/364 (general movement and residence), 90/365 (retired persons) and 93/96 (students), OJ 1990 L180/26, L180/28 and OJ 1993 L317/59 respectively; all repealed and replaced by Directive 2004/38/EC).

<sup>46</sup> Though still tied to facilitation of ‘occupational activities’, there is an express reference to ‘Community citizens’ in Case 143/87 *Stanton v Institut national d’assurances sociales pour travailleurs indépendants (Inasti)* [1988] ECR 3877, para. 13. This was reaffirmed in Case C-370/90 *R v Immigration Appeal Tribunal and Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265, para. 16, and sketched more

academic commentary.<sup>47</sup> This work laid an irrefutable blueprint for contemporary EU citizenship law, in positive but also more limiting ways.<sup>48</sup> The idea of European citizenship began to emerge also in the EU political forum (providing another example of legal/political conversations that were never properly joined up). There, we can trace growing emphasis on the role of the citizen in the pursuit of polity integration and appeals to more emotional features of citizenship, such as cultural and other forms of belonging and identity. The incremental evolution of citizenship through parallel legal/political processes resonates in several ways with the analogous discussion on the EU polity in part II above. First, the humanising of the person through E(E)C law was not an inevitable progression from the original Treaty provisions.<sup>49</sup> It was instead a deliberate and recurring multi-institutional choice driven by different motivations, often connected more to progression of the polity than to protection of the individual. Second, describing this process in the language of citizenship was picked up not just by commentators looking in, but also by the institutional actors themselves. Third, there then began a process of the manipulation of citizenship to serve polity integration objectives.

Interestingly, these ideas did not envisage value-added or complementary transnational citizenship, but drew instead from the paradigm of state membership.<sup>50</sup> There was a clear expression of trust (or perhaps hope) that citizenship might plug growing perceptions of democracy and legitimacy concerns.<sup>51</sup> While the rhetoric became increasingly

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rhetorically by AG Jacobs in Case C-168/91 *Konstantinidis v Stadt Altensteig, Standesamt, & Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191, para. 46 of the Opinion.

<sup>47</sup> E.g. AC Evans, 'European citizenship' (1982) 45 *MLR* 497, TC Hartley, *EEC Immigration Law*, (North-Holland, 1978); and see generally, O'Leary, n7 above.

<sup>48</sup> Some of the constraints that continue to check the scope of free movement rights are discussed in more detail below e.g. the uneasy friction that characterises the piercing by EU law of national welfare provision.

<sup>49</sup> The Spaak Report, for example, talks about regional balance and equality of treatment where it deals with the free movement of workers (*Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères*, Secretariat of the Intergovernmental Conference, Brussels, 21 April 1956, 88-9), but there is no indication of any *particular* importance attached to persons. Faist, n3 above, 43, comments that '[t]he free movement of workers introduced by the Treaty of Rome (1957) was largely a product of Italy's influence which at that time was the biggest exporter of labour to the EU'. Later, the Commission White Paper on Completing the Internal Market (COM (85) 310 final) did make some impassioned pleas on behalf of the 'people of Europe' (see especially, 55, paras 219 and 220), but in the more abstract vein of advancing the Community project.

<sup>50</sup> Kadelbach traces key political initiatives in the 1970s which display an emerging concept of citizenship, including the Tindemans Report in 1975 (Bull. EC Suppl. 1-76), the 1984 Draft Treaty on European Union (OJ 1984 C77/53), and the work of the Adoninno Committee (Bull. EC Supp. 7/85 and 'A People's Europe', Bull. EC Supp. 2/88); see S Kadelbach, 'Union Citizenship', Jean Monnet Working Paper no. 9/03, <http://www.jeanmonnetprogram.org/papers/03/030901-04.html>, 7-8.

<sup>51</sup> On the emergence and refinement of citizenship in the Maastricht debates, see O'Leary, n7 above, 23-30.

political, however, the manifestation of citizenship in real terms was grounded in free movement rights.<sup>52</sup> And movement is still, for good or ill, the guts of EU citizenship.

If we agree that the realisation of EU citizenship is traceable long before 1993, then an assertion that Treaty codification in and of itself marks a point at which market citizenship can be left behind is not an adequate explanation of things. In other words, if we accept the Maastricht Treaty as a significant but, nonetheless, *single* point on the EU citizenship trajectory, that line must necessarily have continued to develop too. In section A, the enduring market content of EU citizenship practice, having particular regard to the shaping frame of constitutionalism and the propelling force of cross-border movement, will be demonstrated empirically. Attention will also be drawn to problems that result from the market citizenship construct, but also to problems that citizenship cannot properly solve anyway. Where relevant, acknowledgement of when and how EU citizenship might go beyond and thus displace the descriptor of market citizenship will be made. Section B then addresses the political rights of EU citizenship, as strengthened by the Lisbon Treaty.

#### *A. The persisting market content of EU citizenship practice*

Almost every substantive judgment on EU citizenship to date has related (to borrow from the free movement of goods) actually or potentially, directly or indirectly to free movement and residence rights.<sup>53</sup> In the breakthrough citizenship case of *Martínez Sala*,<sup>54</sup> the Court of Justice adapted the case law on service recipients – which had come gradually to decouple a direct linkage between personal/material scope – to apply rights developed originally for the economically active (material) to the situation of EU citizens (personal) who were accepted as being lawfully resident (through Community or national means) in a host State irrespective of the extent to which they *currently* met the economic self-sufficiency and/or medical insurance conditions of the Residence Directives. In that case, non-discriminatory access to a child-raising allowance was extracted from the material Treaty scope of social advantages – bestowed normally on migrant workers – and transposed to the personal scope of a lawfully resident, non-working migrant EU citizen.

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<sup>52</sup> E.g. European Commission, *Towards European Citizenship: The Granting of Special Rights*, COM (75) 321 final; see S O'Leary, 'The free movement of persons and services', in P Craig and G de Búrca (eds.), *The Evolution of EU Law* (OUP, 1999) 377, 381.

<sup>53</sup> The exceptions are Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917 (voting rights/Gibraltar) and Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055 (voting rights/Aruba), addressed in section B below.

<sup>54</sup> Case C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.



Building on these foundations, citizenship is often used as an additional plank in economic free movement cases.<sup>55</sup> It has also been used to justify ‘pure’ rights to movement and residence.<sup>56</sup> But the legal contribution of EU citizenship has enabled much more than this too, in summary: (1) softening the impact of the legislative self-sufficiency/medical insurance limitations, especially through the invocation of proportionality;<sup>57</sup> (2) bringing substantive policy issues within the scope of the Treaty;<sup>58</sup> (3) revisiting case law which had more restrictive outcomes because of reliance on the economic freedoms, often to enable more comprehensive protection of fundamental rights;<sup>59</sup> and even (4) guarding against potential inconveniences that might affect the (as yet indeterminate) exercise of free movement rights.<sup>60</sup> Increasingly, the humanity of the person and the added value of citizenship are engaged to rationalise these expansionist trends in case law on personal movement.<sup>61</sup> The concept of citizenship is thus seen as bringing a – legitimate – *material* dimension to the interpretative process. Moreover, the application of citizenship almost always, though not always, resolves the case to the benefit of the person concerned.<sup>62</sup>

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<sup>55</sup> E.g. Case C-274/96 *Criminal proceedings against Bickel and Franz* [1998] ECR I-7637, in conjunction with service recipient rights.

<sup>56</sup> E.g. Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925

<sup>57</sup> E.g. Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091 (accepting less than the legislatively codified requirement of ‘comprehensive’ medical insurance); Case C-184/99 *Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193 (non-discriminatory entitlement to national minimum subsistence allowance for a final-year student). On the constitutional significance of using of proportionality in this way, see M Dougan, ‘The constitutional dimension to the case law on Union citizenship’ (2006) 31 *ELRev* 613.

<sup>58</sup> E.g. Case C-209/03 *Bidar v London Borough of Ealing; Secretary of State for Education and Skills* [2005] ECR I-2119, (maintenance grants for students, reversing Case 39/86 *Lair v Universität Hannover* [1988] ECR 3161).

<sup>59</sup> E.g. compare Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607, on Regulation 1612/68, and Case C-127/08 *Metock and others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241, on Directive 2004/38 (residence rights for third country national family members).

<sup>60</sup> E.g. Case C-148/02 *Garcia Avello v Belgian State* [2003] ECR I-11613 (displacing host State rules on registration of children’s surnames to facilitate home State conventions).

<sup>61</sup> E.g. E Spaventa, ‘From *Gebhard* to *Carpenter*: Towards a (non-)economic European constitution’, (2004) 41 *CMLRev* 743; RCA White, ‘Free movement, equal treatment, and citizenship of the Union’, (2005) 54 *ICLQ* 885. See also, Kostakopoulou, n1 above, 265, where she describes these as ‘brave decisions that adjusted the dissonance between European citizenship’s constitutional design and reality, thereby realising the transformative possibilities of European citizenship in the process of interim integration’ (although, she sees this as evidence that (263) ‘European citizenship is no longer a symbolic institution and the mirror image of “market citizenship”’).

<sup>62</sup> The judgment in Case C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507 is a rare example of where citizenship arguments did not persuade the Court to opt for the more favourable outcome for the individual concerned (requiring her to repay a student maintenance grant relating to a certain period when she did not meet host State conditions i.e. she was neither a worker nor resident in the host State for five years). The outcome in this case was clearly influenced by the adoption of Directive 2004/38 (though this measure was not yet in force at the material time); see S O’Leary ‘Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance’ (2009) 34 *ELRev* 612.

But all of this still fits readily with the idea of market citizenship, especially given the overwhelming emphasis in citizenship case law on the potency of cross-border movement. So, yes, the case law on EU citizenship pushes the boundaries of EU free movement law, but not further than can be explained through a constitutionalised understanding of the primary driver: facilitating (advocating?) the exercise of movement and residence rights.<sup>63</sup> Creeping towards the fringes of free movement law, however, there are interesting questions that stretch the market framework in more difficult and intriguing ways. The following paragraphs assess both the challenges that these questions already pose for EU citizenship and the extent to which further developments on these issues could *still* be accommodated within a constitutional market framework. It should be noted, however, that the glowing picture emerging through citizenship case law is not synonymous with citizenship experience in practice; several reports have called for urgent attention to be paid to the implementation of rights granted by EU law<sup>64</sup> and political efforts are increasingly channelled towards the resolution of this problem.<sup>65</sup>

*(i) Reverse discrimination and the purely internal rule<sup>66</sup>*

Despite being pushed to (and arguably beyond) its limits, free movement law clings formally to the rule that Treaty relevance is triggered only when an actual or potential (but not hypothetical) cross-border effect is identifiable. This leads to the related statements that (1) situations considered to be wholly internal to a Member State lie outside the scope of EU free movement law, and thus, outside the scope of EU citizenship;<sup>67</sup> and (2) Member States may

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<sup>63</sup> Freedom of movement and residence has been described as the ‘central right of citizenship’ (see AG Colomer, Joined Cases C-11 and 12/06 *Morgan and Bucher* [2007] ECR I-9161, para. 67 of the Opinion); see also, para. 19 of AG Maduro’s Opinion in Case C-524/06 *Huber* [2008] ECR I-9705: ‘When the Court describes Union citizenship as the ‘fundamental status’ of nationals *it is not making a political statement*; it refers to Union citizenship *as a legal concept* which goes hand in hand with specific rights for Union citizens. *Principal among them* is the right to enter and live in another Member State’ (emphasis added).

<sup>64</sup> E.g. European Commission, *Fifth Report on Citizenship of the Union*, COM(2008) 85 final; European Commission, *Report to the European Parliament and the Council on the Application of Directive 2004/38*, COM(2008) 840 final; European Citizen Action Service, *Mind the Gap: Towards a Better Enforcement of European Citizens’ Rights of Free Movement*, December 2009, available at <http://www.ecas-citizens.eu/content/view/291/1/>.

<sup>65</sup> E.g. Communication from the Commission to the European Parliament and Council on guidance for better transposition and application of Directive 2004/38, COM(2009) 313 final; see also, the European Commission’s 2010 public consultation on citizenship (‘EU Citizens’ Rights – The way forward: Consultation on how to strengthen the rights stemming from Union Citizenship’), at [http://ec.europa.eu/justice\\_home/news/consulting\\_public/news\\_consulting\\_0007\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0007_en.htm)

<sup>66</sup> See generally, A Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International, 2009).

<sup>67</sup> E.g. *Garcia Avello*, para. 26: ‘[c]itizenship of the Union...is not, however, intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law’.

withhold from their own (non-mobile) nationals the substantive benefits that they may be compelled to provide to lawfully resident EU nationals (the phenomenon of reverse discrimination).<sup>68</sup> The persisting reification of movement has been questioned extensively in the literature, from the perspective of incoherent results in the case law<sup>69</sup> and, more recently, against the force of citizenship as a meaningful construct.<sup>70</sup> Essentially, the triggering factor of movement is not considered to be an appropriate condition for access to the rights available under EU citizenship or a sufficient criterion to justify the asymmetric situations that can result from its application. On a purely formal analysis, the Treaty does not in fact prevent consideration of internal situations, at least in so far as persons are concerned. Article 26(2) TFEU simply outlines an area ‘without *internal* frontiers’, a sufficiently ambiguous reservoir of interpretative potential although not one drawn from to date in this context.<sup>71</sup> Similarly, Article 21(1) refers to movement and residence ‘within’ – not ‘across’ – the territory of the States.

Although not writing specifically on reverse discrimination, Advocate General Colomer has observed that the ‘change in perspective [from free movement of persons to citizens] is not insignificant, because, *rather than falling on the concept of movement*, the focus of attention has shifted to the individual.’<sup>72</sup> A change in perspective may well have occurred; but the Court still insists on the need to find some cross-border dimension, even a potential one, before the protective scope of Treaty protection is unleashed.<sup>73</sup> Moreover, the polity-transforming effect of reconsidering this approach must be borne in mind. It would open up a whole swathe of Member State policies and practices to EU scrutiny following decades of express insistence that such issues were not amenable to such scrutiny at all. This would seem all the more curious given the express delimitation of EU and Member State competences

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<sup>68</sup> Reunification of static EU citizens with third country national family members is the classic example here e.g. Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para. 23); and cf. Directive 2003/86/EC on the right to family reunification (2003 OJ L251/12) which applies to third country nationals lawfully resident in Member States.

<sup>69</sup> See N Nic Shuibhne, ‘Free movement of persons and the wholly internal rule: Time to move on?’ (2002) 39 *CMLRev* 731; A Tryfonidou, n66 above.

<sup>70</sup> E Spaventa, ‘Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects’ (2008) 45 *CMLRev* 13; Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Community* [2008] ECR I-1683, paras 112-157.

<sup>71</sup> E.g. Case C-378/97 *Wijzenbeek* [1999] ECR I-6207, in which the combined effect of Articles 14 and 18 EC was found *not* to defeat the requirement to show proof of identification at Member State frontiers; for more on the constitutional effects of Article 14 EC, see the Opinion of AG Cosmas, para. 37 onwards.

<sup>72</sup> Case C-228/07 *Petersen v Arbeitsmarktservice Niederösterreich* [2008] ECR I-6989, para. 28 of the Opinion (emphasis added).

<sup>73</sup> In contrast to the reasoning of AG Sharpston (cited in n. 70 above), see the judgment of the Court in Case C-212/06 *Government of the French Community and Walloon Government v Flemish Community* [2008] ECR I-1683, paras 32-39.

recently effected by the Lisbon Treaty. Irrespective of the desirability or otherwise of such a move, the magnitude of the change must be acknowledged, reinforcing the inherent connectedness of polity and citizenship evolution.

The debate may soon take an interesting twist, as a recent reference to the Court for a preliminary ruling does not hold back, directly asking the Court to rationalise the wholly internal rule against the counterpoint of EU citizenship. In *Ruiz Zambrano*, the referring national court has asked inter alia whether the Treaty provisions on EU citizenship in combination with Article 18 TFEU (ex 12 EC) ‘confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, *irrespective of whether he has previously exercised his right to move within the territory of the Member States*’.<sup>74</sup> This shows that lawyers somehow refuse to abandon the purely internal debate the Court’s responses to date. National courts and tribunals are not happy, for whatever reasons, to leave it there. But even if its resolution protrudes expressly into the previously protected realm of reverse discrimination by Member States, and even acknowledging the polity-transforming consequences of such a decision, it is submitted that the breadth and depth of the constitutional market framework codified in the EU Treaties could still accommodate the outcome. In other words, market citizenship already has the tools-in-waiting needed for the accommodation of purely internal situations, conceptually and also formally through the ambiguous Treaty language defining the EU internal market and the scope of the free movement of persons.

(ii) *Citizenship beyond Articles 20-25 TFEU*

This is a vital question that has not been properly resolved. Citizenship beyond Articles 20-25 TFEU can mean two things: first, literally, the extent to which citizenship rights are ring-fenced within the Treaty provisions designated expressly as outlining the rights attached to EU citizenship<sup>75</sup>; and, second, the extent to which a more abstract essence of citizenship can

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<sup>74</sup> Case C-34/09 *Ruiz Zambrano v Office national de l’emploi*, pending; see OJ 2009 C90/10 (emphasis added).

<sup>75</sup> Article 20 TFEU gathers these rights together in one provision, namely: the right to move and reside freely within the territory of the Member States; the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; and the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages (and obtain a reply in the same language).

or should be applied as a global principle of Treaty interpretation, having a material impact on the way in which other internal market situations, for example, are determined.<sup>76</sup> Both questions are based on the same premise: whether EU citizenship per se has a legally meaningful effect when the situation under review falls outwith the rights expressly listed in Article 20 TFEU – which are, after all, described as being citizenship rights ‘inter alia’. Moreover, the provision does not specify just *that* part of the Treaty. Drawing from the constitutional debates noted earlier, these questions explore ‘big C/small c’ citizenship and the relationship between the two.

Looking at the first question, which seeks to quantify citizenship rights, an extensive range of EU policy objectives – consumer and environmental protection, public health and education, for example, not to mention implementation of the internal market in general – has delivered wide-ranging outputs for EU citizens over many years. Is this body of law part of EU citizenship in a more direct sense? That could be one way of understanding the idea that the internal market is ultimately maintained for the individuals within it, representing a normative stage beyond the citizen-as-consumer<sup>77</sup> and suggesting instead a market ‘for’ the citizens.<sup>78</sup> While subsequent Treaty amendments have enhanced competence in many of these policy fields, express limitations remain in place.<sup>79</sup> Blurring the lines between discrete competences and citizenship rights, however worthy the motivations, might thus exacerbate concerns about EU over-reach.<sup>80</sup>

The second question raises more of a qualitative conundrum: citizenship as a – meaningful – global principle of Treaty interpretation. AG Maduro, for example, has suggested that EU citizenship should resonate right across the application of free movement law.<sup>81</sup> Following the Lisbon amendments, particular importance is attached to a range of

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<sup>76</sup> Shaw, n18 above, addresses similar questions by charting citizenship ‘of’ and ‘in’ the Union.

<sup>77</sup> In tracing the history of the European market citizen, Everson sees him/her primarily as a consumer (n3 above, 86-87). That construct is considerably narrower than the concept of market citizenship advanced here but it seems to be the dominant archetype throughout the Commission’s *Single market for the 21st century*, COM(2007) 724 final. On the concept of the consumer-citizen within the EU, see M Everson and C Joerges, ‘Consumer Citizenship in Postnational Constellations?’ (2006) EUI Working Paper, Law No. 2006/47, <http://cadmus.eui.eu/dspace/bitstream/1814/6547/1/LAW%202006-47.pdf>

<sup>78</sup> This idea permeates the tone of the 2010 Monti Report, n35 above.

<sup>79</sup> See especially, Articles 4 (shared competences) and 6 (supporting, coordinating and supplementary competences) TFEU.

<sup>80</sup> These arguments are developed in more detail in N Nic Shuibhne, ‘EU citizenship after Lisbon’, in D Ashiagbor, N Countouris, and I Lianos (eds.) *The EU After Lisbon* (CUP, 2011, forthcoming).

<sup>81</sup> See his Opinion in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135, especially paras 40 and 51. See also, A Tryfonidou, ‘Further steps on the road to convergence among the market freedoms’ (2010) 35 *ELRev* 36.

concerns that are required to inform the activities of the EU.<sup>82</sup> Should EU citizenship be considered to command the same interpretative obligation? This may be an appealing notion, but it is not a straightforward one. Several points highlight the limitations of citizenship – since it is, by definition, an inherently exclusionary status – in this context.

First, as suggested above, an inclusive understanding of EU citizenship broadens not just the scope of citizenship but potentially broadens EU competence to act in Treaty-constrained policy areas too. This might make the idea of citizenship more meaningful but it raises questions of polity capacity and thus legitimacy. While substantive outcomes enabled in this way may still fit within a market framework, the hardening of citizenship as an interpretative device might transcend the conditions of mobility and even nationality that currently characterise the ‘additionality’ of EU citizenship. This would have to induce the kind of political and eventually polity changes that would demand reappraisal of the market adjective. This seems wholly unlikely, however, given the contemporary emphasis on more express delimitation of EU and Member State competences.

Second, interpretative expansion through the use of citizenship is not a one-way dynamic. The approach outlined by AG Maduro, for example, could raise *constraining* nationality questions where no such questions existed previously (e.g. in respect of the nationality of importers/exporters of goods).<sup>83</sup> EU citizenship may be grounded in the market, but that does not require that all market interests must be grounded in citizenship.

Third, while the Treaty provisions on citizenship (especially Article 21 TFEU) have been used increasingly by litigants and by the Court itself, most free movement cases are still resolved using the provisions on work, services, capital or establishment. The Court still considers the economic free movement provisions *first* and uses Article 21 TFEU only when the situation under review does not fall comfortably within the more specific Treaty freedoms.<sup>84</sup> As a legal tool, citizenship is considered to be residual; turning that around would be another enormous interpretative shift. The Court has certainly become a more confident user of citizenship. In a string of recent cases, however – *Vatsouras*, *Teixeira* and *Ibrahim* – the rights of workers under Article 45 TFEU were used to achieve outcomes that were *not* possible under the EU citizenship framework because of the limitations prescribed by Directive 2004/38, even though the exercise of work in all three cases was either

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<sup>82</sup> See Title II TFEU (‘Provisions having general application’) and, in particular, Articles 8-12.

<sup>83</sup> See further, P Oliver and S Enchelmaier, ‘Free movement of goods: Recent developments in the case law’, (2007) 44 *CMLRev* 649, 677.

<sup>84</sup> See further, N. Nic Shuibhne, ‘Case comment on *Schwarz*, *Commission v Germany*, and *Morgan and Bucher*’ (2008) 45 *CMLRev* 771, 774-775.

prospective (*Vatsouras*) or tangential (*Ibrahim* and *Teixeira*).<sup>85</sup> Even if the Court subconsciously reasoned these judgments by invoking of citizenship as a global principle of Treaty interpretation, it was at pains to emphasise that it was *not* doing so. But for present purposes: either way, whether derived through work or citizenship, the substantive rights developed in all of these cases nonetheless fit squarely within a market citizenship paradigm.

In conclusion, it was argued in this section that, first, there is ample space in the market citizen paradigm for the accommodation of further citizenship developments. For example, the legal framework of the market designed by the EU Treaty could, in formal terms at least, accommodate a change in approach to questions of reverse discrimination. Second, as regards the effecting of citizenship rights beyond the confines of Articles 18-25 TFEU, the normative authority of citizenship as a global interpretative mechanism is already evidenced in free movement law, but pushing for more widespread invocation of this could present considerable challenges from the perspectives of EU competence and legitimacy. At the margins of capacity, some forms of developing EU citizenship would indeed strain the constitutional market framework, but would also induce shifts in institutional and political structures that would in turn demand re-imagination of the EU as a polity in any event. This brings us to consider, finally, how the political dimension of citizenship relates to all of this.

#### *B. The market shaping of (even) EU political rights*

European integration forces us to rethink constitutional legal theory ... It assumes a constitution, without a traditional political community defined and presupposed by that constitution; or it requires a new form of political community.<sup>86</sup>

Political rights are a defining feature of any citizenship. The EU Treaty specifies a number of political rights for EU citizens, summarised in Article 20 TFEU and elaborated on in Articles 22 (municipal and European parliament elections), 23 (diplomatic or consular protection in a third country) and 24 (petitioning the European Parliament, applying to the Ombudsman, writing to/receiving a reply from EU institutions, bodies, offices or agencies in any language

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<sup>85</sup> Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, judgment of 4 April 2009, not yet reported (using Article 45 TFEU to accommodate social benefits for job-seekers, thereby circumventing restrictions set down in Article 24(2) of Directive 2004/38); Case C-480/08 *Teixeira* and Case C-310/08 *Ibrahim*, both delivered on 23 February 2010, not yet reported (using Article 12 of Regulation 1612/68 to establish rights of residence in a host State for the primary carers of children of (former) migrant workers still in host State education, notwithstanding the fact that neither applicant satisfied the economic self-sufficiency conditions required for EU citizens in Directive 2004/38).

<sup>86</sup> Maduro, n36 above, 175.

specified in Article 55(1) TEU) TFEU. These provisions are now underpinned by Article 10(3) TEU, which confirms *inter alia* the right of every EU citizen ‘to participate in the democratic life of the Union’.

Just as we have seen more generally throughout this article, discussion of the political rights attached to EU citizenship tends to be differentiated from the market origins, at least, of the status. But it is important, for the purposes of the present article, to remember three contextual points in this regard. First, the rights to petition the European Parliament and apply to the European Ombudsman are extended, in Articles 227 and 228 TFEU, to *all* natural and legal persons lawfully resident in an EU Member State. Similarly, natural or legal persons resident in an EU Member State may also avail of any of the Treaty languages when petitioning the Parliament or applying to the Ombudsman. It is also unlikely that different language rules will apply to EU citizens on the one hand and those lawfully resident in an EU State on the other regarding communications with EU bodies and agencies (the specifics of which are detailed in the relevant founding decisions). This means that the new citizens’ initiative, access to diplomatic or consular protection of any Member State when in a third country, and rights to vote in/stand for municipal and European Parliament elections are the only ‘pure’ EU *citizenship* political rights.

Second, it is simply too soon to ascertain the contribution to EU citizenship offered by two of those three remaining rights. The newly constituted citizens’ initiative provides a mechanism for EU citizens to engage directly with EU law-making. Cross-referencing to Article 11(4) TFEU,<sup>87</sup> the new first paragraph of Article 24 TFEU empowers the Council and European Parliament to adopt regulations determining ‘the procedures and conditions required for a citizens’ initiative...including the minimum number of Member States from which such citizens must come’.<sup>88</sup> But it is impossible to predict how effective or otherwise this new opportunity will prove to be. The success of the citizens’ initiative rests with the citizens themselves, appropriately enough, but assuming that States as well as the EU institutions engage with ensuring both access to and information about the procedure, about what it is for, and how it works. That process may in itself advance information and better understanding about just what it is that the EU can – and, conversely, cannot – do. It will also be interesting to observe whether a genuinely transnational political community emerges

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<sup>87</sup> ‘Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties’.

<sup>88</sup> Recalling the proviso in Article 11(4) TEU that these one million citizens must be nationals of a ‘significant’ number of Member States.



through this mechanism, or if more organised interests simply hijack the process for their own ends. Access to diplomatic or consular protection is also an interesting novelty and a good example of creative, bottom-up possibilities that might in the longer term generate a real connection (even a feeling of belonging) to the EU per se as distinct from its component States.<sup>89</sup> It is rather like free movement rights, in that it will not be claimed by many – but it might, also like free movement rights, make a profound difference for the individual(s) concerned where it *does* need to be invoked.

Electoral rights, the third category of ‘pure’ political citizenship rights, have considerably wider impact. Following direct elections to the European Parliament for the first time in 1979, the Commission issued a proposal in 1988 on voting in municipal elections.<sup>90</sup> Progress on this was ultimately deferred in view of preparatory work on the realisation of these rights instead through what was to become the TEU. But that Treaty’s codification of electoral rights in the context of residence in *another* Member State is framed in non-discrimination and thus amplified the continuing resonance of the constitutional *and* the market.<sup>91</sup> In his joint Opinion in *Spain v UK* and *Eman and Sevinger*, Advocate General Tizzano suggested the existence of a *general* right to vote for EU citizens, quite apart from the context of residence in another State, reasoning that Article 22(2) TFEU ‘takes it for granted that the right in question is available to citizens of the Union’ and drawing also from ‘the principles of democracy on which the Union is based’.<sup>92</sup> This is supported by scholarship;<sup>93</sup> but the Court has not (yet) confirmed it. That provides, for now at least, the third limitation on discussion of political EU citizenship rights. It is worth noting, however, that the striking reach of non-discrimination in *Eman and Sevinger*, arguably a wholly internal case, casts the judgment as all the more remarkable, and makes it a potential catalyst in waiting should the Court decide to continue to pierce the shield of internal State business.<sup>94</sup>

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<sup>89</sup> See Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, OJ 1995 L314/73; the Commission has identified this issue as a priority for further action, see

[http://ec.europa.eu/justice/policies/citizenship/diplomatic/policies\\_citizenship\\_diplomatic\\_en.htm](http://ec.europa.eu/justice/policies/citizenship/diplomatic/policies_citizenship_diplomatic_en.htm)

<sup>90</sup> OJ 1988 C246/3.

<sup>91</sup> Some commentators similarly sited political rights in the movement corner of EU citizenship: e.g. V. Lippolis, ‘European citizenship: What it is and what it could be’, in M. La Torre (ed.), *European Citizenship: An Institutional Challenge*, (The Hague: Kluwer Law International, 1998), 317, 321-322.

<sup>92</sup> Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, Opinion of AG Tizzano, paras 67-69.

<sup>93</sup> E.g. Shaw, n18 above.

<sup>94</sup> See further, D Kochenov, ‘Free movement and participation in the parliamentary elections in the Member State of nationality: An ignored link?’ (2009) 16 *Maastricht Journal of European and Comparative Law* 197 at 214-215. The recent decision in *Rottmann* on the impact of EU citizenship (and, more specifically, a required proportionality assessment) on State competence to determine the loss and acquisition of nationality is another example of a judgment that may yet challenge apparently reserved

Thus, bearing in mind the much shorter evolutionary trajectory of the political citizenship rights that we *do* have in the EU context, this section focuses instead on a critical gap. As early as 1975, the Commission asserted that ‘complete assimilation with nationals as regards political rights is desirable in the long term from the point of view of a European Union’.<sup>95</sup> This ambition highlights arguably *the* most problematic gap in EU citizenship from political, constitutional *and market* perspectives i.e. voting rights in national elections for EU citizens who reside in a State other than their home State (who cannot avail of nationally granted external voting rights, or who do not reside in a host State benefiting from a bilateral voting arrangement, such as that between Ireland and the UK). Given the relationship of political dependence between the EU polity and its State components, and the significance of this for polity legitimacy discussed in part II, this gap, as Everson has observed, means that ‘while this citizen is “attached” to two forms of society, it is master of neither’.<sup>96</sup> Although Everson criticises this from the perspective of the citizen being ‘denied entry to the body politic which ultimately determines the course of the nation’, the argument is extended here to reflect more the exclusion of EU citizens from contributing to host State policy on EU matters through the crucial participation of national governments and parliaments in EU decision-making –offending both the spirit and substance of constitutional market citizenship and emptying the new statements in Article 10 TEU of real meaning. It is ironic that mobile citizens are protected so strongly in many respects yet excluded so decisively from participation in the multi-level political mosaic of EU decision-making.

Kochenov provides a persuasive argument in favour of enfranchisement, reviewing Treaty, case law and coordinated national prospects for resolving this ‘acute problem in European law’.<sup>97</sup> He also reminds us that, even leaving aside valid normative arguments about exclusion from participation, case law on EU citizenship is characterised by intense distaste for obstacles that not only prevent but also make more difficult, discourage, deter or disadvantage the exercise or potential exercise of free movement. Loss of voting rights in national parliamentary elections is surely a profound example of such disadvantage. It is also one of the few aspects of EU citizenship that citizens *themselves* have actively questioned.<sup>98</sup> Moreover, Shaw suggests that the social welfare inclusion effected by Directive 2004/38 and

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State competences in more acute ways (Case C-135/08 *Rottman*, judgment of 2 March 2010, not yet reported).

<sup>95</sup> European Commission, *Towards European Citizenship: The Granting of Special Rights*, COM(75) 321 final, para. 3.1.

<sup>96</sup> Everson, n4 above, 77.

<sup>97</sup> See again, Kochenov, n94 above.

<sup>98</sup> J Shaw, ‘EU citizenship and political rights in an evolving European Union’ (2007) 75 *Fordham Law Review* 2549 at 2558-2559.

host State obligations of permanent residence sit at odds with the absence of any impact on national voting rights. The Lisbon Treaty has not (nor would the Constitution have) changed this.<sup>99</sup> Thus, although Article 25 TFEU enables the granting of additional citizenship rights outwith a full-blown Treaty reform process, the silence from recent IGCs indicates that the Member States are not contemplating this step in any serious way.

There is no doubt that implementing a system that enables voting in national elections for migrant EU citizens would demand the careful working out of a range of conditions and integration thresholds, and its normative basis would probably need roots in both home State exportability and host State responsibility. This shares clear parallels with the evolution of enhanced host State welfare provision for the non-economically self-sufficient: which has taken time, but is coming gradually to pass. National elections bear on even more sensitive molecules of sovereignty than social solidarity, but the end-game here is even more critical for the long-term health of the EU as a polity. There may be real constitutional difficulties about the extension of voting rights to non-nationals in some Member States, and so we might not have a perfect or even complete solution.<sup>100</sup> As we saw in a different context above, though, perhaps the ethos if not the letter of European Court of Human Rights jurisprudence could be drawn from here too in terms of the responsibility that States must accept when shaping the polities that they design.

‘Even’ market citizenship means that we should not be mollified or misled by ‘a modicum of political participation rights associated with the decision-making processes needed to make the market idea work’.<sup>101</sup> The constitutional casing around the EU market itself demands more. In his exploration of atypical forms of democratic deliberation and participation, Gerstenberg touches on a movement-as-identity idea, arguing that:

... freedom of movement enables citizens to trigger off, *on the European level itself*, a process of constitutional justification as to how to balance autonomy and equality. What emerges is an argument-theoretical constellation in which freedom of movement as a fundamental individual right is not merely a “trump” (to be deployed by economic actors to the effect of broadening the realm of private autonomy), but a device of deliberate inclusion....In this sense, freedom of movement, in the expansive interpretation given to it by the Court of Justice, operates not merely as a “negative” right, but acquires the meaning of a “positive” right to participation in constitutional deliberation.<sup>102</sup>

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<sup>99</sup> *Ibid.*, 2553. For an overview of proposals developing EU citizenship that did/did *not* find their way into the Constitutional Treaty (OJ 2004 C310/1), see Kostakopoulou, n1 above, 261-263.

<sup>100</sup> *Ibid.*, 2574-2577.

<sup>101</sup> J Shaw, ‘Citizenship of the union: Towards post-national membership?’, Jean Monnet Working Paper no. 6/97, at <http://www.jeanmonnetprogram.org/papers/97/97-06-.html>, 8.

<sup>102</sup> Gerstenberg, n22 above, 181-182.

So it is not that constructs of community or identity or participation are irrelevant to the thesis of market citizenship; but instead, that their manifestation can differ from conventional (national) channels. EU citizenship challenges us to contemplate more imaginatively what *type* of political strength we need to add at the EU level. Della Scala and Wiener oscillate between movement-as-identity ('a new type of belongingness to the EU has been created, based on everyday practices of groups of citizens') and identity-as-identity ('[b]y crossing borders, creating burgundy coloured passports, sharing new voting practices in European and municipal elections, residing in other member states than that of their nationality, and experiencing a variety of "European" cultures these groups have given substance to a notion of Europeanness') conceptions of citizenship.<sup>103</sup>

Everson argued in 1995 that the 'self-interest' of the instrumentalist market citizen did not establish a 'general allegiance to the Communities'.<sup>104</sup> But this does not mean that it *can* not. Ironically, the functional market gains that EU citizens participate in on a frequent basis are perhaps the least well-sold aspects of the continuing EU integration project. Most people are unaware of the internal market happening all around them. Neither does this mean that EU institutions can be immune from high political and democratic standards. But it does mean that there is a more limited political *range* for something like the EU, as currently constituted, to manipulate. This in turn allows transnational identity to evolve in a more functional than emotional way.<sup>105</sup> Functional citizenship manifests real participation in the polity of which the citizens are – and might eventually feel that they are – members. The Lisbon-effected role of national parliaments in assessing the adherence of EU legislative proposals to subsidiarity is one new way through which this might become more visible. Similarly, the impact in reality of the citizens' initiative should be carefully tracked. When we emphasise only the attachment aspects of social and political membership, we underplay valuable market citizenship cards and walk ourselves further into a belonging deficit that is much more difficult to unpick. The European anthem cannot be shoved down the throats of EU citizens. They will respond to it or they won't, and that is entirely their prerogative. It also brings back the point about the extent to which the States can contribute some of the missing political creed to the EU (even at a basic level if they, frankly, behave better and own up to the consensual character of their actions when they engage with their supranational guises instead of coming home to stoke populism by 'blaming Brussels').

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<sup>103</sup> Della Scala and Wiener, n25 above, 16.

<sup>104</sup> Everson, n4 above, 85.

<sup>105</sup> For a contrary view, see Everson, n4 above, 88-90.

It is not just market-as-identity then, or even movement-as-identity. It is more market-participation as identity. For now, as discussed, this means cross-border market participation. The organic pace of things must also be accommodated: '[p]ut crudely: it is far from clear that Polish taxpayers would be prepared to pay for the unemployment benefits of French citizens living in France; or that Irish taxpayers would be happy to fund healthcare for Greek nationals residing in Greece.'<sup>106</sup> Turn that around, though, and the prospect of speedier or more effective hospital treatment in another State is going to seem far more appealing to most EU citizens. The inherent give/take link between both situations needs to be highlighted. A methodology centred only on individual state welfare capacity fails to take seriously the inherently shared aspects of the contemporary reality of social provision. But against the backdrop of the economic crisis and the palpable current of national protectionism in associated public debate, both conceptual and actual advances in building this kind of transnational solidarity will be challenging, at best.<sup>107</sup>

The degree to which we may or may not commit to transnational social solidarity exemplifies questions of political identity and their intersection with the framework of the constitutional market. Advocate General Maduro captured the evolving nature of solidarity in his remark that '[c]itizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bounds of the national community, but also within the wider context of the society of peoples of the Union.'<sup>108</sup> This 'society of peoples of the Union' is an extremely complicated and uneven space, acutely demonstrated by the conflict between social dumping and social protection in *Laval*. The Court of Justice was strongly criticised for the crudity of its market-based reasoning.<sup>109</sup> But it is important to remember that the Court's construction of things is not the only solution possible under market reasoning. In his 2010 report, Monti emphasised that the legal changes effected by the Lisbon Treaty<sup>110</sup> can ensure that 'the concerns raised by the trade unions

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<sup>106</sup> M Dougan and E Spaventa, "'Wish you weren't here..." New models of social solidarity in the European Union', in M Dougan and E Spaventa (eds.) *Social Welfare and EU Law* (Hart Publishing, 2005) 181 at 188.

<sup>107</sup> For analysis of the emerging shape of transnational solidarity, see the essays in M Ross and Y Borgmann-Prebil (eds.) *Promoting Solidarity in the European Union* (OUP, 2010); starting from the premise of national solidarity, A Somek, 'Solidarity decomposed: Being and time in European citizenship' (2007) 32 *ELRev* 787.

<sup>108</sup> Case C-499/06 *Nerkowska* [2008] ECR I-3993, para. 23 of the Opinion.

<sup>109</sup> E.g. C Barnard 'Social dumping or dumping socialism' (2008) 67 *CLJ* 262; S Deakin 'Regulatory competition after *Laval*' (2007-2008) 10 *CYELS* 581; P Syrpis and T Novitz 'Economic and social rights in conflict: political and judicial approaches to their reconciliation' (2008) 33 *ELRev* 411.

<sup>110</sup> Pointing here to codification of the 'social market economy' objective in Article 3(3) TEU and the legally binding quality conferred on the EU Charter of Fundamental Rights by Article 6(1) TEU.

should hopefully find an adequate response'.<sup>111</sup> The Court of Justice has to take these express instructions on board; and the Member States too need to take responsibility for ensuring that the Posted Workers Directive is either properly implemented in national law and/or amended if it is agreed that its present orientation does not capture intended objectives of social protection.<sup>112</sup> Otherwise, social exclusion creeps in as yet another exclusionary facet of EU citizenship on top of nationality and non-mobility. And the important point for present purposes is that these aspects of *Laval* were not demanded by the EU market, or by its citizenship.

In his Opinion in *Petersen*, Advocate General Colomer captured the complexity of which market citizenship is fully capable, though he did not himself use this term:

The Court has gone beyond [the] State perspective and incorporated into the *acquis communautaire* an approach more in keeping with the nature of citizenship of the Union. [T]he importance of the responsibilities and obligations of States of origin is noticeably waning in favour of the responsibilities and obligations of host States. Therefore...even though it may become a burden on public funds, States must provide the same services to all citizens of the Union, irrespective of their nationality and residence, if they prove that they carry out activities comparable to those carried out by persons who do have a link with the political community of that State. That principle is strengthened where a citizen of the Union proves that he is not a financial burden on the host State, regardless of his source of income or the method used to obtain citizenship. It is, therefore, the notion of belonging in a material sense, aside from any administrative requirements, which justifies the inclusion of citizens of the Union in the political community. When the ties of identity with a single State are broken so that they may be shared with others, a connection is woven in a wider sphere. As a result, the notion of European belonging is created, which the Treaties seek to strengthen ... Accordingly, the emergence of fundamental rights, on the one hand, and the link with the State of which the individual concerned effectively is part, on the other, imbue the case-law with a constitutional dimension. That serves to protect the status of the free citizen in the democratic sphere of the Union, an aspect which is enshrined in the reality of a Union governed by the rule of law in which legal provisions, especially the ones in the Treaties, guarantee individual freedom and democratic equality.<sup>113</sup>

There is a danger of reductionism in looking to less orthodox solutions to gloss over real structural defects. But there is also a danger in *not* looking to them and so finding the EU eternally flawed when evaluated against familiar but ultimately inappropriate comparators. Some of the ideas contained in the extract above need to be worked out in more detail and

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<sup>111</sup> Monti, n35 above, p. 70. The 'role of the social partners' and 'diversity of national systems' are also given express recognition in Article 152 TFEU.

<sup>112</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L18/1); see S Sciarra 'Viking and Laval: Collective labour rights and market freedoms in the enlarged EU' (2007-2008) 10 CYELS 563 at 578-9.

<sup>113</sup> *Petersen*, paras 30-32 of the Opinion (internal references omitted).

rationalised more fully. But it uses, at least, a language of political membership and belonging that is arguably more suited to the EU than the way in which we address similar ideas in the context of States. It also suggests that redressing the political imbalance of the EU and its citizenship might well be achievable within the seemingly counter-intuitive framework of the market.

#### IV. Conclusion

This article has argued that our understanding of market citizenship must be shaped by the particular market to which the relationship of citizenship is attached. The idea of the EU as accommodating a constitutional market enables us to accommodate a complex, rights-driven profile of EU market citizenship. Looking at the trajectory of citizenship in this way means that codification of citizenship rights in the Treaty marks just one step in a functional lineage of constitutionally enhanced free movement rights. The article thus rejects the thesis that market citizenship is a construct of the distant past. Rather, market citizenship continues to capture and enable both material and membership elements of EU citizenship and the framework of EU market citizenship holds potential also for further development.<sup>114</sup> The argument builds on the intricate links between the EU and its Member States, as well as between their respective and complementary citizenships. It tries to avoid over-Stating our expectations of EU citizenship and highlights instead what transnational citizenship actually does and can deliver in value-added terms. By reviving market-rooted questions about the EU as a polity and its developing version of citizenship, the article simply asks that we reflect on questions that we are more likely to write off just a little too quickly. A thesis of market citizenship does not mean that we should stop striving for the evolution or even transformation of EU citizenship. The current incarnation of the market citizen is neither a perfect nor definitive one and market citizenship may or may not prove to be a phase of transition. Moreover, the argument developed here does not seek to dismiss or displace the wealth of normative thinking, contested as it is, that now conceptualises EU citizenship in

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<sup>114</sup> Looking at the dormant side of EU citizenship, a credible list of citizenship duties could be articulated even by re-conceptualising *existing* rules and practices. Indirect examples could include funding of the EU through the payment of different forms of taxation. Some direct examples can be distilled from free movement law (e.g. the Court has confirmed that the benefits of free movement law should not be abused (Case C-212/97 *Centros* [1999] ECR I-1459, freedom of establishment; Case C-109/01 *Secretary of State for the Home Department v Akrich* [2003] ECR I-9607, free movement of workers); arguably, then, a duty *not* to abuse free movement law could be inferred). The evolving competences of the Union also offer new ideas about the obligations as much as rights of EU citizens; see e.g. A Ryall, 'Communicating European environmental citizenship', draft paper presented at the 2010 UACES Conference, available at <http://www.uaces.org/pdf/papers/1002/Ryall.pdf>

creative and challenging ways. Rather, it questions the extent to which we are actually 'there yet' in empirical terms.

Defending the market framework is intended also as a device for arguing a much broader point i.e. that trying to force the EU to run before it can walk will simply lead to inevitable and unhelpful disappointment and a fated feeling of failure. We need to remember just how new this polity, its structures, institutions and processes actually are. Thinking in parallel terms about the history of state-based citizenship, the EU and its citizenship are newborns. In comparative terms, both the polity and its citizenship have, in fact, already come an incredibly long way.